

February 20, 2018

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In Re FLINT WATER CASES Case No. 16-10444

STATUS CONFERENCE

BEFORE THE HONORABLE JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

FEBRUARY 20, 2018

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P R O C E E D I N G S

THE CLERK: The matter before the Court is In Re Flint Water Cases. Attorneys, please put your appearances on the record.

MR. WASHINGTON: Val Washington appearing on behalf of the Anderson individual plaintiffs and Joel Lee individually.

THE COURT: Thank you, Mr. Washington.

MR. BRONSTEIN: Peretz Bronstein on behalf of the class.

THE COURT: Thank you, very much.

MR. NOVAK: Paul Novak on behalf of the class plaintiffs.

THE COURT: Okay.

MR. MORRISSEY: Steve Morrissey on behalf of the class plaintiffs.

MR. MCALPINE: Mark McAlpine, state class action liaison counsel.

THE COURT: And please be seated after you've made your appearance.

MS. WEINER: Jeseca Weiner on behalf of the class plaintiffs.

THE COURT: Okay.

MR. PITT: And Michael Pitt on behalf of the class.

MR. SHKOLNIK: Hunter Shkolnik, co-liaison for the

1 individual plaintiffs.

2 THE COURT: Thank you.

3 MR. BLOCK: Jerome Block from the law firm of Levy
4 Konigsberg here for Corey Stern, co-liaison counsel for the
5 personal injury claimants. Thank you.

6 THE COURT: Thank you.

7 MS. BETTENHAUSEN: Margaret Bettenhausen on behalf of
8 state defendants.

9 THE COURT: Thank you.

10 MR. KIM: William Kim on behalf of the City of Flint
11 and former Mayor Dayne Walling.

12 MR. RUSEK: Good morning, your Honor. Alexander
13 Rusek on behalf of defendant Howard Croft.

14 MR. BERG: Good morning, your Honor. Rick Berg here
15 on behalf of the City of Flint.

16 THE COURT: Thank you.

17 MR. MENDEL: Todd Mendel on behalf of Governor
18 Snyder.

19 MR. KLEIN: Sheldon Klein on behalf of the City of
20 Flint.

21 MR. ERICKSON: Philip Erickson on behalf of the LAN
22 defendants.

23 MR. GRUNERT: John Grunert on behalf of Veolia North
24 America defendants.

25 MR. CAMPBELL: Good morning, again, your Honor.

1 James Campbell. I represent the VNA defendants as well.

2 MR. WILLIAMS: Good morning, your Honor. Michael
3 Williams for the VNA defendants as well.

4 MR. MORGAN: Thaddeus Morgan for Liane Shekter Smith.

5 MR. GRASHOFF: Good morning, your Honor. Phil
6 Grashoff on behalf of Stephen Busch.

7 THE COURT: Great. Thank you.

8 MR. BARBIERI: Charles Barbieri for MDEQ defendants
9 Prysby, Rosenthal, and Cook.

10 MR. PATTWELL: Michael Pattwell on behalf of Dan
11 Wyant and Brad Wurfel.

12 MR. MEYER: Brett Meyer on behalf of Michael Glasgow,
13 your Honor.

14 THE COURT: Okay.

15 MR. THOMPSON: Craig Thompson for defendant Rowe
16 Professional Services Company.

17 THE COURT: Thank you.

18 MR. GALVIN: Good morning, your Honor. Joseph Galvin
19 on behalf of the Genesee County Drain Commissioner Jeff
20 Wright.

21 MR. WOLF: Good morning, your Honor. Barry Wolf on
22 behalf of Gerald Ambrose.

23 MR. MEYERS: Good morning, your Honor. David Meyers
24 on behalf of defendant Daugherty Johnson.

25 MR. NYAMFUKUDZA: Good morning, your Honor. Takura

1 Nyamfukudza on behalf of Robert Scott.

2 THE COURT: Thank you, so much.

3 MS. WILLIAMS: Good morning, your Honor. Shawntane
4 Williams on behalf of Alexander plaintiffs.

5 MR. SANDERS: Good morning, your Honor. Herb Sanders
6 on behalf of the Alexander plaintiffs.

7 THE COURT: Thank you.

8 MR. SIMPSON: Good morning, your Honor. John
9 Simpson, Napoli Shkolnik, on behalf of individual plaintiffs.

10 MR. WISE: Good morning, your Honor. Matt Wise on
11 behalf of Jeff Wright.

12 MS. HERMAN: Good morning, your Honor.

13 THE COURT: I can't hear you. Can you speak up?

14 MS. HERMAN: Good morning, your Honor. Mindy Herman
15 on behalf of the Washington class plaintiffs.

16 THE COURT: Okay.

17 MR. SHARP: Good morning, your Honor. Ryan Sharp on
18 behalf of the Washington class plaintiffs.

19 MR. MACDONALD: Brian MacDonald on behalf of
20 defendant McLaren.

21 MR. MURPHY: William H. Murphy the Third, your Honor,
22 on behalf of the Boler class.

23 MR. SZOKOLY: Good morning, your Honor. A
24 decaffeinated Nick Szokoly on behalf of the Boler class.

25 MR. BLAKE: Good morning, your Honor. Jayson Blake

1 on behalf of the class plaintiffs in state court and here.

2 MR. PERKIN: Good morning, your Honor. Good morning
3 to your staff. May it please this honorable Court, my name is
4 Todd Russell Perkins appearing on behalf of Darnell Earley.
5 And I have my co-counsel not with an appearance, Mr. McGinnis,
6 who's seated only because he doesn't have an appearance.

7 THE COURT: Okay. Hi, Mr. McGinnis. We've had many
8 other cases together. It's always good to see you.

9 Mr. Goodman.

10 MR. GOODMAN: Good morning, your Honor. Bill Goodman
11 on behalf of the class plaintiffs as well as the individual
12 plaintiffs, the Marble family.

13 MS. LABELLE: Good morning. Deborah LaBelle on
14 behalf of the class plaintiffs, the Mays plaintiffs, and the
15 Marble plaintiffs.

16 THE COURT: Thank you.

17 MS. BEREZOFSKY: Good morning, your Honor. Esther
18 Berezofsky on behalf of the class plaintiffs and the Gulla
19 plaintiffs.

20 THE COURT: Thank you. Thank you, all, for being
21 here. And I apologize for us starting a little late. I
22 wanted to mention on the record that we had a 10 o'clock
23 meeting in chambers that was not being taken down -- Jeseca
24 was here checking people in -- that just generally provided an
25 opportunity for the liaison counsel, the interim co-lead

1 counsel, and the executive committee or administrative
2 committee of defendants to review a few proposed agenda items.
3 And I can report on the status of that as we go through the
4 agenda.

5 I also want to mention that we do have -- I have a
6 time limit on this hearing today. And I'll let you know when
7 we're getting close to it. But I just want to put that out
8 there, that we have to try to be a little efficient with the
9 time. And that's probably always a good reminder both for me
10 and for everyone else.

11 The other thing is that in order for the record to be
12 clear, I need to have individuals who are speaking come to the
13 podium, to the lectern, so that we know exactly who's
14 speaking. And please identify yourself so that the record is
15 very clear about who's speaking and on behalf of whom.

16 So with that, an agenda was issued on February 13th.
17 It's docket entry 375. And a number of the issues are simply
18 informing people of how things are currently being resolved.

19 The first one is the termination of pending
20 dispositive motions in the individual cases. And I don't
21 think that there's anything further to discuss there except
22 that in chambers there were some additional dates set for
23 responsive briefing in the Leo A Daly motion to dismiss for
24 lack of personal jurisdiction issue. And those dates will be
25 set forth in an order that comes out of this hearing today.

1 MR. SHKOLNIK: Your Honor, on that one issue.

2 THE COURT: Yeah. Mr. Shkolnik, state your name.

3 MR. SHKOLNIK: I'm sorry. Hunter Shkolnik on behalf
4 of -- the liaison on behalf of plaintiffs. Counsel for Leo A
5 Daly and I discussed as we were walking down that we need to
6 meet and confer regarding the language that would make the
7 order on the personal jurisdiction motions apply to all the
8 cases and that we would have a meet and confer. If that could
9 also be added to the Court's dates.

10 THE COURT: It can be. And for those of you who were
11 not a part of that discussion, what we're just trying to sort
12 out is not needing to file this motion in all of the cases
13 individually, but to file them in the Carthan case. But also
14 to permit individual liaison counsel to have an opportunity to
15 respond separate from the class counsel.

16 So I'm granting that request for them to have an
17 opportunity to respond and for Leo A Daly to have one reply
18 brief to be filed. And we just -- a stipulated order
19 indicating that it will apply in all of the cases would be
20 great.

21 MR. SHKOLNIK: Yes. And we're going to work out the
22 language of it for the Court.

23 THE COURT: Yes.

24 MR. SHKOLNIK: Thank you.

25 THE COURT: Okay. Thank you.

1 The next issue I think is clear or I hope is clear
2 from what was set forth, that the dispositive briefing does
3 not need to change following the very small amendment to
4 correct the factual information about several of the
5 defendants who have been criminally charged or have not been
6 criminally charged.

7 Same with the next issue, which is future amendment
8 of nonclass individual complaints. There was a request sort
9 of to limit further amendments. And the fact is Federal Rule
10 of Civil Procedure 15(a)(2) provides the process for amending
11 complaints in all federal litigation and it will apply here.

12 The next issue is the inclusion of Marble versus
13 Snyder and the use of the short-form complaint. And what I
14 have requested here was to know more about which of the cases
15 in this court make a legionella claim.

16 I received that information. But I also learned in
17 the in chambers informal conference that there are potentially
18 some 54 -- some significant number of cases in state court
19 alleging legionella claims as well.

20 And so I think that I need to correct myself here at
21 the top of page 4. Because as I was originally looking at the
22 short-form complaint, it didn't have McLaren Regional Medical
23 Center as a defendant. But it certainly has an opportunity
24 for any plaintiff to add a defendant. And so the current
25 short-form complaint can accommodate the legionella claims and

1 will still be -- those claims are still subject to the Court's
2 order that they be amended to conform to the short-form
3 complaint.

4 And Mr. Goodman, will you -- if you're going to
5 speak, please come to the lectern.

6 MR. GOODMAN: I understand, your Honor.

7 THE COURT: And give me just a second, please. Okay.

8 MR. GOODMAN: Thank you, your Honor. On behalf of --

9 THE COURT: Bill Goodman on behalf of -- I try to
10 model the behavior.

11 MR. GOODMAN: I sometimes do forget my name. But
12 William Goodman on behalf of the Marble family here.

13 THE COURT: Okay.

14 MR. GOODMAN: And the plaintiff Lashema Marble is
15 present in court and I have discussed this matter with her in
16 some detail. The Marble case, as distinguished from all of
17 the cases -- from the non legionella cases of course is
18 different in that McLaren is a defendant.

19 However, the Marble case also differs from the other
20 legionella cases in particular due to the emphasis on certain
21 relationships between the plaintiffs and McLaren Hospital.
22 And that has to do with the fact that there was no diagnoses
23 of legionella upon her death. We have to rely on expert
24 testimony in order to establish that.

25 But that, in fact, there is a separate claim in the

1 Marble case with regard to the concealment of the legionella
2 both before and after Ms. Marble's death inflicting what we
3 contend to be potential infliction of emotional distress.
4 That makes this case distinct and quite different I think from
5 all of the cases and even all of the other legionella cases.
6 And based upon that, we are looking for some separation.

7 THE COURT: But I understand what you're saying. And
8 I appreciate that there are -- is a different defendant and an
9 additional claim or cause of action contained in your
10 complaint.

11 MR. GOODMAN: Yes.

12 THE COURT: But what I'm not following is are you
13 suggesting you can't use the short-form complaint because of
14 that? Because it permits you to add counts and add
15 defendants.

16 MR. GOODMAN: We can use the short-form complaint but
17 we are -- given the peculiarity of the case, we believe that
18 it should be dealt with outside of the short form system. And
19 outside of the liaison counsel system based upon matters which
20 I understand were raised in chambers and which will maybe
21 determine pursuant to other motion practice. But that also is
22 a matter of discomfort to my clients.

23 THE COURT: Okay. And here's an initial response is
24 that if their -- the liaison counsel, as I contemplate or
25 understand the process, they do not become the Marble family's

1 lawyers. You and your co-counsel on that case are their
2 lawyers.

3 They have certain duties and obligations to
4 communicate to ensure that all of the individual plaintiffs
5 have the knowledge that they need related to the Court's
6 orders and things of that nature. But they are not your
7 client's lawyers.

8 MR. GOODMAN: Yes.

9 THE COURT: And so I guess what I would do is permit
10 you to file a brief regarding why this case should be on a
11 separate track. But in deciding whether to do that, I would
12 just caution you that my initial response without the benefit
13 of your briefing is that this ought to be able to be managed
14 as part of this process.

15 The underlying facts, not with respect to McLaren but
16 with respect to all the other defendants, seem to be very
17 similar, that the allegation of what the breakdown was and
18 what the violations were that would make it make sense for
19 your case to be a part of this process.

20 MR. GOODMAN: Thank you, your Honor. Then your note
21 of caution is duly taken under my consideration.

22 THE COURT: And so would you like to brief this at
23 this time? Or what I'd like to see if we could accomplish is
24 to have the legionella cases -- there's going to be different
25 kinds of discovery in those cases that more medical records or

1 different kinds of medical records and all of the sorts of
2 damages that may be different, entirely different from the
3 lead contamination damage assessments.

4 So I understand that there may need to be a different
5 global discovery order that would apply to the legionella
6 claims. But it seems to me that it can be managed within this
7 process.

8 MR. GOODMAN: Well, I would like an opportunity to
9 confer with my client. And if I could have perhaps 24 hours
10 at least to make a final decision so whether we need to --

11 THE COURT: Oh, certainly.

12 MR. GOODMAN: -- engage in additional briefing, I can
13 let the Court know. I can advise the Court.

14 THE COURT: Then why don't you do this, which is
15 advise us by the close of business on Friday.

16 MR. GOODMAN: Will do.

17 THE COURT: Now, I think you're going to have to find
18 your way forward and announce yourself one more time from
19 McLaren.

20 MR. SHKOLNIK: Your Honor, while waiting for the next
21 attorney on the McLaren issue, just so the record is clear,
22 there is also a Kidd v McLaren which is before the Court. So
23 there's a second McLaren case.

24 THE COURT: Okay.

25 MR. SHKOLNIK: Irrespective of what happens with Mr.

1 Goodman's client.

2 THE COURT: Thank you.

3 MR. GOODMAN: Thank you, your Honor.

4 MR. MACDONALD: Good morning, your Honor. Brian
5 MacDonald for McLaren. As the Court pointed out, McLaren is
6 involved in this in only one case. Liaison counsel just
7 mentioned the Kidd case. McLaren is not a defendant in that
8 case at all and has never been. McLaren is a defendant in a
9 Kidd case in the circuit court level, which McLaren is the
10 only defendant in any of the circuit court actions. There are
11 no other players in the circuit court actions.

12 And so I don't really understand when the Court says
13 you understand there are 54 cases at the state court level.
14 There are 19 cases at the state court level alleging medical
15 malpractice issues, which we've appealed. But also alleging
16 premise liability only against McLaren in legionella fashion.

17 As I understand, none of those plaintiffs, apart from
18 the mention of Kidd, are involved in any of the actions here.
19 They're being represented by the Fieger Law Firm in the state
20 court. There were state players that were initially sued in
21 it and it was removed and they were dismissed. And so they
22 were back in state court only as to McLaren.

23 This is the only case for which there are allegations
24 against McLaren in this entire foray. And so that's why we
25 object to the conclusion in the master complaint or the short

1 complaint for the obvious reasons as to discovery issues and
2 the like.

3 Separate and apart from that, we have filed --

4 THE COURT: Well, let's stop there. When you say you
5 object because of discovery issues, what -- tell me what you
6 mean by that. Because you won't be ordered to produce
7 documents that don't exist.

8 If there's an order that communication regarding the
9 switch of the water from one source to another or back to the
10 Detroit water and sewerage department, you just would have
11 nothing responsive to that.

12 MR. MACDONALD: Well, we do have our own system. You
13 know, McLaren -- having been someone who lives in Flint for 67
14 years and practiced in the city for 43, I represent a hospital
15 who is also located in the city who is also supplied the water
16 by the City of Flint.

17 THE COURT: Yeah.

18 MR. MACDONALD: So all of that happens and I haven't
19 been approached by anyone to represent me. Except for Mr.
20 Washington. Apart from that, Judge, is that we do have
21 certain documents that are peculiar to our hospital water
22 systems.

23 THE COURT: Oh, yeah.

24 MR. MACDONALD: But the fact is, Judge, is that with
25 the master complaint, there is a small mention of legionella

1 within the master complaint. Not as to this defendant at all.
2 As to causation as to the city and as to the state and the
3 other players. But not as to McLaren.

4 And my fear is that all of a sudden we will now be
5 bootstrapped into other allegations of legionella when we have
6 never been sued for it or we've never been added as a party in
7 those cases.

8 THE COURT: I don't foresee that happening. First of
9 all, it will be my duty to read the -- to continue to read the
10 complaint in the context of any motions or any requested
11 discovery. And so your suggestion is the way to avoid that is
12 to have Mr. Goodman and the Marble family proceed on their own
13 separate from this process.

14 MR. MACDONALD: Their theory is completely different
15 than the underlying master complaint or short complaint. It's
16 a completely different theory. We also filed a motion to
17 dismiss, Judge. Because as Mr. Goodman stated, part of their
18 complaint -- not the totality, but part of their complaint is
19 that McLaren didn't do certain testing that would have
20 revealed legionella. Cultures and the like.

21 Those smell of malpractice for which there was no
22 tort reform compliance as far as affidavits of merits or
23 notices of intent. So those are peculiar motions that are
24 apart from anything the liaison defense counsel would be
25 handling.

1 THE COURT: So then maybe what needs to happen is you
2 and Mr. Goodman submit a proposed order with a motion or an
3 agreed upon motion to the Court that this -- your case be
4 handled separately.

5 MR. MACDONALD: And that's only from my point. I
6 know Ms. Bettenhausen had a different position from the state
7 because they are also defendants in the Marble case.

8 THE COURT: Yeah.

9 MR. MACDONALD: So everybody else may have a
10 different -- that's just my take on it.

11 THE COURT: Okay.

12 MR. MACDONALD: But I have no problem working with
13 Mr. Goodman on that issue.

14 THE COURT: Okay. But I can assure you that any
15 bootstrapping will be tamped down.

16 MR. MACDONALD: Okay.

17 THE COURT: It doesn't work.

18 MR. MACDONALD: Okay. Thank you.

19 THE COURT: Ms. Bettenhausen.

20 MS. BETTENHAUSEN: Sure, your Honor.

21 THE COURT: Please state your name and your client.

22 MS. BETTENHAUSEN: Sorry. Margaret Bettenhausen on
23 behalf of state defendants. I think we've said it at the
24 previous status conference that since the master and the short
25 form do, you know, can be used to include McLaren and whatever

1 different types of counts, that it makes sense.

2 There is some similarities with all the allegations
3 that we believe. And we read your order granting the motion
4 for the master and short form since it was filed in Marble to
5 apply to it since, you know, it involves the general
6 allegations for the Flint water complaints.

7 I mean, I think that our position hasn't changed.
8 And oddly, both Mr. MacDonald and I had conversations with Mr.
9 Goodman and I thought we had come to an agreement. Yes, it's
10 part of the same process. There was just confusion on our
11 part.

12 THE COURT: Okay. All right.

13 MS. BETTENHAUSEN: I'm not sure that we need -- I
14 think we've already pretty much explained it. I think we feel
15 very similar to the Court that a lot of it's going to be
16 overlapping with all these other issues, so that it would make
17 more sense to have all the discovery all the issues worked out
18 together. But I don't know that we need to brief it out, but
19 we'd certainly be happy to if it helped the Court.

20 THE COURT: Thank you. I actually don't know that a
21 brief would be helpful. But I'll certainly permit it if you
22 want to file it, Mr. Goodman or Mr. MacDonald, if you want to
23 file it together. But I would just try to reassure all of the
24 parties here that your case will be dealt with individually to
25 the extent it's unlike the other cases. There's no other

1 choice than that. And that's what's required and we'll do
2 that.

3 MR. GOODMAN: William Goodman, again, on behalf of
4 the Marble family. Your Honor, all I can say is that I follow
5 the Court's suggestion or at least understand the Court's
6 suggestion with regard to briefing. I take it that suggestion
7 is separate and apart from the suggestion that the Court
8 made to Mr. MacDonald about the possibility of he and I
9 entering into a stipulation of some sort and providing it to
10 the Court.

11 THE COURT: You're asking whether those are two
12 separate -- well, if you can agree on what you both think and
13 want to tell me, that would be one thing. And if you can't,
14 then it will be two separate submissions.

15 MR. GOODMAN: I understand. Thank you.

16 THE COURT: But what it does occur to me is that
17 there would be a somewhat different motion practice in terms
18 of Mr. MacDonald is flagging these issues with regard to tort
19 requirement or medical malpractice requirements, affidavit of
20 --

21 MR. MACDONALD: Merit.

22 THE COURT: Affidavit of merit. I knew that. And
23 that had not been done. And that wouldn't apply to any of the
24 other cases. So there is going to have to be some different
25 attention and schedule for the Marble case than the other

1 cases for that reason.

2 So if you would address that and make a proposal but
3 within the context of knowing that it's my hope to keep the
4 Flint Water Cases combined to the extent that we can. Thank
5 you, Mr. Goodman.

6 The next issue on the agenda is the master individual
7 complaint and briefing schedule in Walters and Sirls. And Mr.
8 Shkolnik, I want to -- and Mr. Block. The Court had entered
9 an order indicating that individual cases needed to be amended
10 to use the short-form complaint by this Friday. And we've
11 only gotten, I believe, two so far from Shkolnik and Stern.

12 So I was seeking upstairs a report on what might have
13 gone wrong in getting that news out to others, if anything.
14 So if you have anything further to say on that.

15 MR. SHKOLNIK: Your Honor, just to respond to that.
16 We will send another notice out to all plaintiffs that they
17 have the obligation to file by this Friday. I know my office
18 has been preparing the complaints to get them filed. And I
19 believe Mr. Stern's office is as well. There were a lot of
20 plaintiffs involved. So we've been working on it.

21 We also think it may be helpful if the defendants, if
22 they give us a list of any plaintiffs that they know have
23 complaints that maybe we don't know about. It may be helpful
24 if we get a service list from the defendants or that they do
25 it themselves, also send a copy of the order out to each of

1 the plaintiffs in cases that they know about that we don't
2 know about at this time.

3 THE COURT: I think it's your job to get that order
4 out.

5 MR. SHKOLNIK: No, no. We did get -- your Honor, we
6 did get the order out.

7 THE COURT: Okay.

8 MR. SHKOLNIK: But we may not know -- like just today
9 we heard about a case that we didn't know was removed to the
10 court. There was a case that was mentioned that was recently
11 removed. There may be a recently removed case that we don't
12 know about yet. So we are following the docket.

13 THE COURT: Certainly.

14 MR. SHKOLNIK: But if the defendants have some
15 specific plaintiff that's new that we can't know about yet, we
16 would ask that we be told so that we can then issue a further
17 notice to those plaintiffs as well.

18 THE COURT: Okay. It's hard to imagine how that
19 would happen because they would have -- in order for the
20 defendants to know they exist, they would have to have been
21 served with the complaint in which case they should be on the
22 docket. But if any of the defense counsel believe there are
23 plaintiffs who are unknown to Mr. Shkolnik and Mr. Stern,
24 please let them know.

25 MR. SHKOLNIK: We're tracking the docket each week.

1 THE COURT: Okay.

2 MR. SHKOLNIK: But if there's a change, if we miss
3 one, we obviously would be happy to be told about it by
4 defense counsel.

5 MR. KIM: Your Honor, this is just a housekeeping
6 matter.

7 THE COURT: And please state your name first.

8 MR. KIM: William Kim for the city, your Honor. I
9 believe that the order was for the short-form complaints to be
10 filed by the 22nd, which I believe is Thursday. But I'm just
11 trying to confirm that. If you can call up the order.

12 THE COURT: It might be. We'll find out. I thought
13 it was the 23rd, but it may be the 22nd. Mr. Sanders, please
14 come forward.

15 MR. SANDERS: May it please the Court, Herb Sanders
16 on behalf of the Alexander plaintiffs. Your Honor, you raised
17 the issue of communication with the individual plaintiffs. I
18 am aware of the deadline that the Court gave, but I believe
19 I'm aware of that deadline pursuant to my attendance at the
20 last status conference. I'm not confident that I've received
21 some other communication. And maybe I am mistaken.

22 But to that end, several status conferences ago, I
23 inquired with the Court of the potential of an executive
24 committee for the individual plaintiffs to assist the liaison
25 counsel. And I believe the Court left that decision to

1 liaison counsel.

2 I would reiterate that request. I would have
3 anticipated by now that there would be a regular communication
4 process with the individual plaintiffs' counsels, a regular
5 phone conference, a website set up whereby we could see and
6 receive materials that have been produced.

7 But that has not happened. There are things,
8 communications, that I have received through the grapevine,
9 for lack of better terminology. And the concern I express is
10 not only my own but I've talked to at least one other counsel
11 this morning who had the same concern who's unfortunately not
12 here today who expressed to me that he had talked to other
13 individual counsels who had the same concern, so --

14 THE COURT: Mr. Sanders, I appreciate what you're
15 saying. And it occurs to me that it may be worth building
16 something into this that I do in criminal cases that have a
17 discovery coordinator which have a multi-defendant case, which
18 is I get a monthly report from the discovery coordinator about
19 the activities they've undertaken. Not the details of
20 defendant 1 is on a wiretap and defendant 2 has a Facebook.
21 But simply that in general, three meetings have taken place
22 with defense counsel. Two meetings have taken place with
23 prison officials and so on. So I may consider something of
24 that nature so that I can be aware of how the process is
25 functioning and whether some new protocol is needed.

1 MR. SANDERS: I appreciate your consideration.

2 THE COURT: Yeah. I appreciate you bringing it to my
3 attention.

4 MR. SANDERS: Thank you, your Honor.

5 THE COURT: Yeah. Mr. Shkolnik.

6 MR. SHKOLNIK: Your Honor, just to respond to that, I
7 know because I've been copied on the e-mails, Corey Stern has
8 been communicating with Mr. Sanders as well as most of the
9 plaintiffs, especially when there's inquires. We've actually
10 had phone calls. And we'll do -- I'm sure we'll do a better
11 job.

12 I know Corey was on trial and I was on another
13 matter. We're talking about last week. But this has been an
14 ongoing dialogue. When orders have come out, they have been
15 put on notice to the parties. And we'll always strive to do a
16 better job on that.

17 THE COURT: Okay. And Mr. Kim is correct. The
18 deadline for amending to the short-form complaint is the 22nd
19 and not the 23rd. So thank you.

20 The other thing is in between the last status
21 conference and this status conference, I prevailed upon the
22 court to set up a public website on the Eastern District of
23 Michigan's website so that orders of interest and concern to
24 others can be available. So I don't recall if I sent that out
25 to all of you. No. Probably not.

1 So it's there right now on the Eastern District of
2 Michigan's website. So that's something that liaison counsel
3 can take advantage of. But only the Court controls what goes
4 on there. But you can certainly request that something be
5 posted there.

6 MR. SHKOLNIK: Thank you, your Honor. We will take
7 the Court's advice and do that.

8 THE COURT: Okay. In terms of whether a report from
9 liaison counsel would be helpful to the Court, my only problem
10 is that there is attorney/client privileged material that
11 takes place in all of this process. And I don't want anyone
12 to violate that in any way. But I don't see that as a problem
13 in getting some kind of regular report.

14 So what I'd like at the time of submission of agenda
15 items is if the liaison counsel could submit and co-lead class
16 counsel some indication as to whether you think something of
17 that nature would be helpful to the process.

18 The next item on the agenda is a time and expense or
19 common benefit order. And in the in chambers status
20 conference or informal conversation, a briefing schedule was
21 worked out for a discussion of that. Mr. Kim, did you --

22 MR. KIM: Nothing further, your Honor.

23 THE COURT: So we won't need to have any further
24 discussion at this time. The motion to stay in the Guertin
25 case is evident what's going on there.

1 I think the next issue that requires any attention is
2 the discovery issue with the City of Flint. I learned from
3 Mr. Kim that March 6th is a date by which Flint can respond.

4 MR. KIM: That is correct, your Honor.

5 THE COURT: Okay. Good. So I think nothing further
6 is needed there either. So I think the next real issue for us
7 to discuss is the jurisdictional discovery related to Veolia
8 Environnement. Do we say the N twice?

9 MR. CAMPBELL: We say VE.

10 THE COURT: VE, that's what we'll say. Okay. I did
11 take french in junior high school. Okay. So why don't we --
12 yeah, proceed. Mr. Campbell will begin there. And who will
13 arguing for the plaintiffs?

14 MS. WEINER: I will be, Judge.

15 THE COURT: You will. Okay. Great.

16 MR. CAMPBELL: Good afternoon, Judge. James
17 Campbell. I represent the VNA defendants in the case.

18 The issue that we're taking up now is the so called
19 jurisdictional discovery that would be directed to my clients,
20 the three defendants in the case, the VNA defendants, that
21 concerns based upon the statements by Mr. Leopold and the two
22 presentations that were made regarding jurisdictional --
23 limited jurisdictional discovery as to VE, the french parent
24 of my three clients, United States entities.

25 The reason why or the basis for our opposition is

1 really quite simple. Rule 26 does not allow for this
2 discovery because it does not pertain to a current claim or
3 defense in the case. And Rule 26 also states that if the
4 discovery isn't within the scope of defined discovery, Rule
5 26(c), that the Court must -- it's not discretionary -- strike
6 the discovery on motion or allow the protective order or the
7 relief sought, if you will.

8 So that's the fundamental basis of the motion. There
9 is no claim or defense in the case by the plaintiffs, any
10 plaintiff, any defendant, whereby the jurisdictional discovery
11 or jurisdictional issues of this french company pertains to
12 any claim or defense.

13 And it's really quite clear on its face. VE is
14 identified as a nonparty in the master complaint. It is not a
15 party to any complaint that we are aware of in the case, in
16 the litigation. There is no allegation in the complaint
17 against VE. There are several paragraphs that make factual
18 allegations.

19 But even there, your Honor, there's a reference in
20 the plaintiffs' briefing about alter ego. But even there, the
21 way that the parties are defined in the consolidated class
22 complaint eliminates VE from the Veolia defendants where the
23 alter ego issues are discussed. So alter ego issues in the
24 consolidated complaint have to do with the three existing
25 defendants.

1 We cited to you, your Honor, the one case that we
2 could find whereby discovery of this nature -- jurisdictional
3 discovery of a nonparty was addressed. It's a case from New
4 Jersey, the Formula 1 case. And it was not permitted. And
5 this discovery is for the very reason that we're talking about
6 was described as being not supportive of a claim or defense.
7 And therefore, outside the scope of discovery from the 2015
8 amendments to the Rules of Civil Procedure and the court must
9 take action on it.

10 In the plaintiffs' briefing, your Honor, they cite to
11 three cases. And each one of them are before the 2015
12 amendments. In fact, one of the cases cites the old language
13 of reasonably --

14 THE COURT: -- associated to the --

15 MR. CAMPBELL: -- yeah. To discoverable evidence.

16 THE COURT: -- discoverable -- admissible evidence.

17 MR. CAMPBELL: Which was specifically omitted from
18 the 2015 amendments adopted in December 2015. And each one of
19 those cases is before that. Each one of the three cases cited
20 by the plaintiffs had a pending -- as I read the cases, your
21 Honor, had a pending motion to add the defendant from which
22 the discovery was sought.

23 So that's a distinguishing factor. But in those
24 three cases also there's no citation to Rule 26. There's no
25 discussion of Rule 26. A lot of the cases go off on state law

1 regarding personal jurisdiction. And there's nothing in those
2 three cases. And specifically they -- well, they're cited in
3 the brief.

4 THE COURT: Yeah.

5 MR. CAMPBELL: That support the argument or address
6 the 2015 amendments to Rule 26. So the discovery regarding
7 personal jurisdiction of a french company to this litigation
8 as it's currently pled is not discoverable. It's irrelevant.
9 It doesn't go to a claim or defense.

10 THE COURT: Okay.

11 MR. CAMPBELL: So that's the basis, Judge.

12 THE COURT: Ms. Weiner.

13 MS. WEINER: Thank you, your Honor. Jessica Weiner
14 on behalf of the class plaintiffs. I won't repeat what we've
15 stated in our briefs, although I will briefly mention that
16 the --

17 THE COURT: I guess what I'd like you to discuss is
18 how I get around the rule itself? That as Mr. Campbell set
19 forth and his brief sets forth, only permits discovery related
20 to a party's claim or defense. And then in Rule 26(b)(2)
21 capital C little 3 or little iii indicates that the Court must
22 limit the frequency and extent of discovery if it's outside a
23 claim or defense.

24 And the Gilcreast -- or is it Gilcreast -- case, you
25 did name VE but then did voluntarily dismiss them I think in

1 response to a motion regarding lack of personal jurisdiction.
2 And so they're currently not a defendant in any of the cases
3 before me. And so sitting here today, I don't see how within
4 the rules I can permit the discovery to go forward.

5 MS. WEINER: I'm happy to address that. Mr. Campbell
6 focused a lot on the 2015 amendments. But the language adding
7 that Rule 26 would permit discovery for information relevant
8 to claims and defenses was made earlier in the 2000
9 amendments.

10 And in the notes to those amendments in describing
11 the types of information that might be relevant to a party's
12 claims or defenses, it was discussed that that is still a
13 broad category. And the language specifically states that a
14 variety of types of information not directly pertinent to the
15 incident in suit could be relevant to the claims or defenses
16 raised in a given action. And one of the examples in those
17 notes is the organizational --

18 THE COURT: But how is jurisdictional discovery
19 regarding VE relevant to a claim or defense in this case?
20 Just point to the claim or the defense.

21 MS. WEINER: Sure. So as we noted in our briefing it
22 is relevant. The organizational structure of VNA and of
23 Veolia generally is relevant to the claims against the VNA
24 defendants.

25 THE COURT: How is the organizational structure

1 beyond -- how is it relevant to a claim for defense?

2 MS. WEINER: It's relevant in terms of the
3 responsibility for decisionmaking and --

4 THE COURT: So you've made an allegation that Veolia,
5 the Veolia defendants have liability in this litigation. So
6 how does taking the deposition -- or how does jurisdictional
7 discovery of a parent company or a related Veolia entity
8 relate to that?

9 MS. WEINER: So I'll note again that the claims or
10 defenses language is still broad. And in the cases we've
11 cited that were post the 2000 amendment, the courts did allow
12 jurisdictional discovery to go forward.

13 THE COURT: All of the cases that I looked at that
14 you cited either had a pending motion to amend or the Court
15 had granted leave to file a motion to amend that had not yet
16 been filed. But so there was -- the Court was presiding over
17 the defendant where the jurisdictional discovery was going to
18 take place either already because there's a motion to amend
19 pending so a decision was going to have to be made about
20 whether it would be futile or not. Or theoretically because a
21 motion had been granted to permit an amendment.

22 MS. WEINER: But in those cases I don't believe the
23 court's decisions turned on the fact that will there was a
24 motion to amend pending before them. And as you know in some
25 of those cases, the motion to amend was not granted or denied

1 prior when the jurisdictional discovery was allowed.

2 THE COURT: Right. But at least there was a claim in
3 the air of that. There was something more than what I have.
4 My initial response when we had the telephone conference call
5 was that this was related to allegations set forth in a couple
6 of paragraphs.

7 But as I listened more carefully to and looked at the
8 rule in light of the request that was made, I don't see how
9 I'm permitted to or how the Court can permit the discovery to
10 go forward unless there's a motion to amend pending.

11 And there must be a reason. I can't get inside of --
12 I don't know the facts. There must be a reason that such a
13 motion isn't pending. And that's just not for me to know or
14 have any part of.

15 MS. WEINER: I understand the Court's concern. And
16 as we mentioned in our brief, in addition to the
17 jurisdictional matter which we think is proper for discovery
18 at this time, the discovery into the organizational structure
19 of these entities is certainly relevant to plaintiffs'
20 existing claims against the VNA defendants.

21 THE COURT: How is the organizational structure
22 relevant to liability, to your claim of Veolia did or didn't
23 do something they were supposed to do that caused harm to your
24 clients?

25 MS. WEINER: It goes to, as I mentioned earlier, the

1 decisionmaking structure allocation of responsibilities and
2 the types of oversight that were exercised by --

3 THE COURT: Say that again. I'm sorry.

4 MS. WEINER: The allocation of responsibilities
5 decisionmaking power within Veolia.

6 THE COURT: Okay. Then if the organizational
7 structure matters, there is a pending motion to dismiss. And
8 whenever that is finally adjudicated -- and we've got -- you
9 know, we've got the schedule to get that done -- then there
10 will be discovery. And you'll take the deposition of the
11 folks at Veolia and say did somebody at VE tell you to do this
12 or did they authorize this, did they sign something?

13 And at that point a motion to amend -- then you've
14 got -- you're getting much closer that may permit you to bring
15 in VE.

16 MS. WEINER: I certainly understand that. I think in
17 terms of efficiency, which I know is something else that the
18 Court is interested in and that the Veolia defendants had
19 raised in their briefs, we do believe it's more efficient to
20 get the parties in the case that should be in the case sooner
21 rather than later.

22 THE COURT: I think so, too. Which is one of the
23 reasons that I started out that discussion thinking, well,
24 this has got to get done. We'll figure out who our defendants
25 are as soon as possible. But I don't see how the rules permit

1 me to do it. And so it will get done.

2 I think you'll get at this issue of the
3 organizational structure and whether there's someone else who
4 has liability in this. But right now, I can't put my
5 highlighter on a claim or a defense that this would be related
6 to.

7 MS. WEINER: Again, I'll direct your Honor to the
8 2000 amendment notes to the rule which specifically lists
9 organizational arrangements as something that might be
10 relevant to a claim or defense. And I've tried to explain why
11 there's a relevant --

12 THE COURT: Okay. Well, explain it to me here. You
13 have allegations against Veolia --

14 MS. WEINER: Yes.

15 THE COURT: -- defendants. And you're trying to
16 figure out whether there's jurisdiction over VE.

17 MS. WEINER: Correct.

18 THE COURT: So how does the relationship between the
19 Veolia defendants and VE, why is that organizational
20 relationship relevant to an existing claim or defense?

21 MS. WEINER: It's relevant to the Veolia entities
22 responsibility, in particular which decisionmakers were
23 responsible for certain actions.

24 THE COURT: That Veolia took?

25 MS. WEINER: That Veolia took and that VNA took.

1 We've alleged in the complaint that these are obviously
2 related entities. And to the extent there are decisionmakers
3 and allocations of responsibility that are relevant to these
4 claims, I think those are certainly discoverable.

5 THE COURT: Okay. Because I see a hundred, many,
6 many ways, that organizational structures in general are
7 related to claims and defenses. But so as a general
8 proposition the committee notes makes intuitively a lot of
9 sense. I'm trying to apply them to this case. And I'm not
10 able to put my fingers on their application at this point.

11 But I appreciate the argument you've made and I think
12 it's worthy of a reasoned written opinion and so I'll take
13 into consideration -- and if Mr. Campbell wants to say
14 anything as a rebuttal or not -- what's been said here and
15 then issue a written opinion.

16 But I can tell you that I can't see anything that
17 would get it to come out the other way at this point. But as
18 I work on the opinion and re-read the cases -- Mr. Campbell
19 sat down. Sometimes it is possible to snatch defeat from the
20 judgment. So that's what my inclination here. And if I see a
21 motion to amend, there would then be, I'm sure, a response
22 that it's futile and we'll get at whether this is appropriate
23 at that point. So thank you, though, very much. Okay.

24 So the next item was the Veolia defendants' Rule 34
25 discovery request. Mr. Campbell.

1 MR. CAMPBELL: Hello, again, your Honor. James
2 Campbell. I represent the VNA defendants. I think this issue
3 for today anyway is probably mooted and we don't need to
4 discuss it. I received a response to the document request
5 last evening. But because I was traveling I have not looked
6 at it and I can't comment on it to any extent.

7 THE COURT: Okay.

8 MR. CAMPBELL: But there was a response. So I think
9 that the issue is mooted.

10 THE COURT: And the response was from?

11 MR. CAMPBELL: From the class counsel.

12 THE COURT: Okay. All right. Good. I'm all for
13 that. There was also docket entry 382 which was submitted by
14 you and Mr. Mason regarding a preliminary discovery plan.

15 MR. CAMPBELL: Yes, your Honor. Thank you. It's
16 James Campbell, again, for the VNA defendants. This is
17 something that I've discussed with your Honor and the Court
18 several times. And I think it goes back to perhaps September
19 of 2017, my best recollection, when your Honor was asking
20 about discovery plans and preliminary discovery and what we
21 can do while the class motion practice plays out.

22 And we've submitted plans in that regard. But I just
23 think the notion is, you know, with the discovery that we just
24 finished argument on and the 34 -- you know, the issues as to
25 all the defendants responding to the document request that

1 your Honor ordered us to respond to, it makes sense to us to
2 continue the discussion about having a comprehensive discovery
3 plan that your Honor would put in place.

4 So rather than go through perhaps a one-off here and
5 there and then we have dust-ups, if you will, before your
6 Honor, that we, perhaps I would suggest for the next
7 conference on April 5th to have the parties submit proposals
8 and plans as to this issue and how we can move things forward
9 in a reasoned and orderly manner rather than in an ad hoc
10 manner I think it would progress.

11 And I think that's consistent with your Honor's
12 desires that you've expressed in the litigation. I would also
13 add this, that I think that there's very little uniform view
14 about this. And I think you're going to hear from lots of
15 different folks.

16 THE COURT: Well, I could see that from your own
17 submission, even the Veolia and LAN didn't agree consistently.

18 MR. CAMPBELL: So that was the point of it, your
19 Honor. And I think you even addressed it in the last argument
20 about when the motion practice plays forth, there will be
21 opportunity for discovery. And since that hearing, I believe,
22 is in May, we would be well served I think to have something
23 in place or start the process. So that was the point of this
24 submission. Thank you, your Honor.

25 THE COURT: Okay. Thank you.

1 MR. SHKOLNIK: Your Honor, Hunter Shkolnik. If I can
2 address that issue as well just briefly on behalf of the
3 individual plaintiffs.

4 THE COURT: Sure.

5 MR. SHKOLNIK: Is it all right to do it from here or
6 should I come up?

7 THE COURT: Okay. Go ahead.

8 MR. SHKOLNIK: Your Honor, the mention I keep hearing
9 is that class -- just for the class, these are the same
10 discovery issues for individual cases. And I would hope if
11 discovery plans are being considered, that it's a single plan
12 for discovery.

13 THE COURT: Well, certainly. Because if you look a
14 the submission document entry 382, there's a lot of mention of
15 fact sheets, which is the work that --

16 MR. SHKOLNIK: Yes. We'll be doing.

17 THE COURT: -- you've been undertaking in the state
18 cases. So I think that --

19 MR. SHKOLNIK: We just would like it to be
20 encompassing so that individuals class and defendants all
21 participate in what will either be a trial plan, discovery
22 plan, whatever the proper word is.

23 THE COURT: Okay.

24 MR. SHKOLNIK: Thank you.

25 THE COURT: Mr. Pitt or --

1 MR. PITT: Mr. Morrissey.

2 THE COURT: Okay. Mr. Morrissey.

3 MR. MORRISSEY: Good morning, your Honor. Steve
4 Morrissey for the class plaintiffs.

5 THE COURT: Good morning.

6 MR. MORRISSEY: We don't have any opposition to the
7 concept of conferring on a comprehensive discovery plan and
8 trying to reach agreement where we can. From the defendant's
9 submission, there are areas that clearly will be some
10 agreement. And I'd like to preview a couple of those.

11 One is the issue of whether class discovery should
12 proceed separately and before merits discovery. The trend
13 since the Dukes case and the Comcast case is to have merits
14 discovery proceed generally at the same time as class
15 discovery. Because at the class certification stage, there is
16 a requirement to consider merits issues. I think that's
17 particularly important.

18 Here where this isn't a case where the class
19 certification issue is a death knell as it is in many cases.
20 This is many cases where merits cases are going to proceed
21 regardless whether on a mass basis or on a class basis. We
22 believe a substantial number of the claims in this case can
23 proceed as a class case. But regardless, merits discovery and
24 class discovery should be going on at the same time, largely
25 involve the same things.

1 THE COURT: I think what I'm interested in I think we
2 have May 10th set aside for the hearing on the motion to --
3 the many motions to dismiss that already have been filed -- is
4 what's appropriate between now and a decision on those
5 motions.

6 MR. MORRISSEY: Between now and then -- what we do
7 have, we just recently got all the documents from the -- that
8 have been produced to the government agencies.

9 THE COURT: Yeah.

10 MR. MORRISSEY: And we're getting our arms around
11 those. And that's a fairly substantial amount of document
12 discovery in this case. I don't think there should be a carte
13 blanche -- I guess it would probably be the opposite of carte
14 blanche, carte rouge. Or foreclosing depositions during that
15 period.

16 I think it should addressed more in an ad hoc basis
17 as it has been with the LAN 30(b)(6) where there was a
18 targeted deposition that it made since to take then and we
19 took it. As we've requested with Veolia where we believe that
20 it made sense to figure out early on, you know, who this
21 entity is, whether we've named all the right parts of it,
22 whether there are other entities that they can deflect blame
23 to to take discovery from that party through a deposition.

24 Now the Court's indicated that you're inclined to
25 decline that deposition for Veolia, but that was the purpose

1 there. If there's another deposition like that that we may
2 seek to take on a targeted basis --

3 THE COURT: Okay.

4 MR. MORRISSEY: -- we would hope to have an
5 opportunity to that from a party as we're seeking there.

6 THE COURT: Maybe what I need to do is set a briefing
7 schedule that sets forth what I'm looking for in more detail
8 before the April 5th status conference. Because I know I've
9 got some defense counsel over here think, you know, thinking
10 to themselves we've got Eleventh Amendment. We've got
11 qualified immunity, we've got all of these arguments. And the
12 whole purpose of those defenses is to avoid litigation.

13 So if the litigation is ordered to proceed prior to
14 adjudicating those motions, they're going to have something to
15 say about that. So I think that's probably what needs to be
16 done.

17 Mr. Campbell and the other defendants have -- or
18 Veolia and LAN have set forth some general areas that they
19 would like to see that they're seeking information from
20 plaintiffs. So I'll figure something else out about what I
21 need to get from the parties to make a decision about what's
22 appropriate between now and a decision on the motions to
23 dismiss.

24 MR. MORRISSEY: Thank you.

25 THE COURT: Mr. Klein. And I will mention that there

1 is still the issue of Mr. Rosenthal and the fact that he
2 certified that he did provide -- I think he's the only
3 individual defendant who certified that he provided additional
4 documents outside of the MDEQ and other productions.

5 MR. BARBIERI: That is correct, your Honor.

6 THE COURT: Thank you, Mr. Barbieri. So I'll be
7 addressing that in a written opinion. So I just want
8 everybody to know that that will -- that decision will be made
9 very soon.

10 MR. KLEIN: Sheldon Klein for the City of Flint.
11 Good afternoon, your Honor. I just have a few comments. And
12 frankly, it was my plan to probably not say anything because
13 the motion that was filed simply identified a few topics that
14 seemed worthy of discussion. And everything's worthy of
15 discussion.

16 But we've kind of drifted into substantive issues
17 here. And I'm not going to argue the substantive issues
18 except to say that I think the discovery schedule is very
19 closely tied to the central substantive issues in this case.
20 There's going to be different than just, well how many months
21 do you need to take depositions, etcetera.

22 THE COURT: Right.

23 MR. KLEIN: Your standard scheduling order. And so I
24 would hope that the briefing would provide an opportunity to
25 explain --

1 THE COURT: Certainly.

2 MR. KLEIN: The theory of the case that drives the
3 proposals as to a scheduling order. The only other thing I
4 would add -- and I'm really accused of being an optimist.

5 But I would hope that rather at least potentially --
6 hopefully there's an opportunity for the parties to really
7 have meaningful meet and confers, agree on what they can agree
8 on, and perhaps provide -- similar to what we've done as to
9 prior motions -- position statements as to the areas of
10 disagreement as opposed to you getting six or eight or ten
11 separate discovery schedules. That strikes me as a very
12 unwieldy, from your standpoint, way to proceed.

13 THE COURT: Okay. It does to me as well. Thank you.

14 MR. KLEIN: And that's all I have, your Honor.

15 THE COURT: Okay. All right. Well, I think that
16 that has brought us to the end of the list of items here in
17 record time. So I appreciate that. And I'll issue a written
18 decision on the issue of the VE discovery that's been sought.
19 I'll also issue a written opinion on the documents that
20 Rosenthal has provided in the underlying other investigations.

21 And then a schedule for briefing regarding
22 preliminary discovery that would or would not, depending on
23 what you submit, be appropriate between now and the decisions
24 on the pending motions to dismiss. And I'll issue a general
25 order, which I've done probably in each one of these, setting

